

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: QWEST COMMUNICATIONS INTERNATIONAL INC. SALE OF PUBLISHING BUSINESS	DOCKET NO. WRU-02-37-272 (SPU-02-15)
---	---

ORDER GRANTING REQUEST FOR WAIVER

(Issued October 18, 2002)

PROCEDURAL HISTORY

On August 20, 2002, Qwest Communications International Inc. (QCII) announced an agreement to sell its QwestDex directory publishing business to a nonaffiliated entity. QCII's press release regarding the sale implies a belief on the part of QCII that regulatory approval of the proposed transaction is not required in Iowa. However, based on the limited information available to the Utilities Board (Board) at the time of the press release, it appeared to the Board that regulatory review may be required in Iowa before the transaction may be closed.

In order to determine the scope of its jurisdiction regarding this matter, the Board issued an order in this docket on August 21, 2002, directing that on or before August 28, 2002, Qwest Corporation (Qwest) file an application for approval of the proposed reorganization, a request for a waiver of the review requirement, or a detailed explanation of the basis for Qwest's apparent belief that review is not

required in Iowa. Other interested parties, including the Consumer Advocate Division of the Department of Justice (Consumer Advocate), were invited to file comments at the same time regarding the application of Iowa Code §§ 476.76 and 476.77 (2001) to these circumstances. Timely filings were made by Consumer Advocate, the Carlyle Group, and Welsh, Carson, Anderson & Stowe (collectively, the Buyers), and Qwest, the public utility subsidiary of QCII that offers regulated local exchange service in Iowa.

On September 4, 2002, the Board issued an order finding that it has jurisdiction to review the proposed transaction pursuant to Iowa Code § 476.77 and that, in the absence of a waiver issued pursuant to § 476.77(4), the transaction cannot take place until the Board's review is completed. The Board found that to the extent the sale of QwestDex could make imputation of directory publishing revenues impossible in future rate review proceedings involving Qwest, the sale would be an indirect disposition of the public utility asset of imputed revenues.

However, the Board also stated that as a possible alternative to a complete review proceeding, Qwest could request a waiver of that review pursuant to § 476.77(4), which authorizes the Board to grant a waiver where review is not necessary in the public interest. In balancing the public interest in granting a waiver, the Board recognized the following points that would tend to weigh in favor of waiver:

1. A binding assurance from Qwest that in any future rate proceeding of any nature, it will be precluded from arguing against imputation

on the grounds that the directory publishing business has been sold. Qwest could reserve any other arguments it may have against imputation, as well as the opportunity to suggest appropriate methods for calculating imputed revenues in a future rate proceeding.

2. Specific assurance from Qwest that sufficient capital will continue to be invested in Iowa to maintain service quality that meets or exceeds all requirements in Board rules and the Qwest/U S West settlement.
3. Specific assurance from Qwest that bidding in any future sale of Iowa rural exchanges will be structured to allow bids for only Iowa exchanges.
4. Information to support a Board finding that Board review of the QwestDex sale is not necessary in the public interest because of the effect on the financial stability of Qwest caused by the delay inherent in review.

Based on its finding of jurisdiction, the Board directed Qwest to file a proposal for reorganization regarding the proposed sale of QwestDex or a request for a waiver of that review before the proposed sale is closed to allow for Board review of the proposal or request.

On September 19, 2002, Qwest filed a request for an expedited waiver of the reorganization statutes and rules, to the extent they apply. Qwest stated that the public interest does not require full reorganization review of the proposed transaction and a waiver is therefore appropriate. Qwest argued that the proposed transaction will not adversely impact day-to-day telecommunications services or rates in Iowa,

will not result in any material changes in telephone directories, and will be transparent to consumers.

Qwest also addressed the four specific factors identified in the Board's September 4, 2002, order. First, Qwest committed that

for the term of the current price plan in Iowa, and for an additional term if that price plan is renewed without substantial changes, Qwest will not initiate a proceeding to change rates on the theory that imputation must end because of the sale of its directory publishing business to Buyer in this transaction. Qwest would, however, remain free to make any other arguments relating to imputation, and to address appropriate methods for calculating any imputed revenues in any future proceeding. Further, Qwest reserves the right to argue that imputation should end because the directory publishing business has been sold in response to any filing made by any other party relating to rates or exogenous changes under the price plan.

(Request for waiver, page 6.)

Second, Qwest committed that it "will continue to invest capital in Iowa sufficient to meet or exceed all applicable requirements in Board rules as well as the merger docket Order, in accordance with the provisions contained therein." (Request for waiver, page 7.)

Third, Qwest stated that it does not contemplate any sale of exchanges at this time, but "in the event that Qwest decides in the future to sell exchanges in Iowa, Qwest will consider bids from all interested parties, including Iowa parties, and will structure the sale process to ensure that bidders are able to submit bids for Iowa properties only." (Id.)

Finally, Qwest stated that the proposed transaction is a critical part of its overall strategy to "de-lever" the QCII balance sheet and ensure the financial stability of QCII and Qwest. The sale of the directory publishing assets in a timely manner is integrally related to Qwest's recently completed refinancing efforts, and a protracted review process could compromise the transaction, which must close by December 15, 2002, or either party may terminate the agreement. Qwest expressed the desire to close the transaction much earlier than that date, in order to reduce market uncertainty on both sides.

On September 19, 2002, the Board issued an order requiring that any responses to Qwest's request for an expedited waiver be filed no later than September 27, 2002.

On September 20, 2002, Qwest filed the non-confidential parts of the transaction documents, and on September 24, 2002, Qwest filed the confidential parts of the transaction documents, along with a request for confidential treatment of those documents.

On September 27, 2002, Consumer Advocate filed a statement in opposition to Qwest's waiver request. Consumer Advocate argued that waiver is the exception, not the rule, and that Qwest had failed to demonstrate that Board review of the proposed transaction is unnecessary.

Consumer Advocate argued that Qwest's first commitment, a qualified assurance that Qwest will not argue against imputation in a future rate proceeding on

the grounds that the directory publishing business has been sold, was inadequate. The commitment "has a series of loopholes under which Qwest will **not** be precluded from arguing against imputation on the grounds that the directory publishing business has been sold, *i.e.*, (i) if the price plan is not renewed; (ii) if the price plan is renewed with changes; or (iii) if any party other than Qwest makes any filing relating to rates or exogenous changes under the price plan." (Opposition at page 2, emphasis in original.)

Consumer Advocate also argued that Qwest's second and third commitments were "exceedingly short and essentially unenforceable . . ." (Id.) Consumer Advocate argued the purported commitments fall short of the Board's "requirement," but did not explain how. Finally, Consumer Advocate argued that Qwest's attempt to show that Board review of the QwestDex sale is not necessary in the public interest was unsupported.

On October 3, 2002, the Board issued an order saying it could not grant Qwest's September 19, 2002, request for waiver because the request did not demonstrate that review of the proposed transaction is not necessary in the public interest. In particular, the Board expressed concern that the duration of the commitment Qwest offered with regard to future rate review proceedings was inadequate and the limitations on the commitment were unreasonable.

With respect to the other three commitments identified in the Board's September 4, 2002, order, the Board found that Qwest had made sufficient

commitments on the second and third factors (continued investment of sufficient capital and possible future sale of Iowa properties, respectively).

The fourth item identified in the September 4, 2002, order concerned a showing of the effect on the financial stability of Qwest that would result from the time required for full review of the proposed transaction. The Board found that Qwest's September 19, 2002, request for waiver included sufficient information to satisfy this requirement, including recent statements by a rating agency, specific provisions of the purchase agreement, and a discussion of the risks associated with the delay inherent in a review proceeding. The Board found Qwest's statements were sufficient to establish the public interest would be advanced by expedited Board action in this matter, if the other concerns are addressed as part of the process.

Thus, the Board found that Qwest had made satisfactory representations and showings regarding its future capital investments in Iowa, its bid procedures for any future sale of Iowa properties, and the public interest detriments that could result from the time required for a full reorganization review proceeding. However, the Board found that Qwest's limited commitment that it would not, in a future rate review proceeding, argue that imputation is inappropriate because of the proposed transaction, was inadequate to alleviate the public interest concerns associated with the proposed transaction, because it was unreasonably limited in duration and because it was unreasonably limited to only Qwest-initiated proceedings to raise rates. The Board indicated that if Qwest were to revise its first commitment to

eliminate these limits, then the Board could apply the waiver standards of 199 IAC 1.3 to determine whether Board review of the proposed transaction is necessary in the public interest and, if it is not, waive the review requirements of §§ 476.76 and 476.77 and 199 IAC ch. 32.

On October 15, 2002, Qwest filed an amended request for expedited waiver, renewing the three commitments the Board previously found to be acceptable and amending its first commitment as follows:

In any future rate proceeding of any nature, Qwest will be precluded from arguing against imputation of directory publishing revenues on the grounds that the directory publishing business has been sold. Qwest reserves any other arguments it may have against imputation. In addition, Qwest also reserves the right to argue that in the future it should be released from this commitment on the basis of material changes in circumstances.

(Amended request at page 6.) This language matches the commitment the Board described in its September 4, 2002, and October 3, 2002, orders.

With that final commitment, the Board can apply the standards of 199 IAC 1.3 to determine whether a waiver is appropriate.

ANALYSIS

The first factor the Board must consider is whether application of the reorganization review statute and rules would work an undue hardship on Qwest. Qwest has offered substantial information to support a finding that the delays associated with full review would result in undue hardship. Qwest describes this

transaction as "a critical part of Qwest's overall strategy to de-lever Qwest's balance sheet and help ensure the financial stability of" Qwest and its parent. Qwest has committed a substantial part of the proceeds of the transaction to a payment to be made during calendar year 2002 as a part of its recently completed refinancing agreement. It is unlikely that the Board could complete a full-scale reorganization review proceeding in a time frame that would accommodate Qwest's needs. The Board will not normally give much weight to an applicant's self-created deadlines when considering this factor, but in the unusual circumstances surrounding this transaction, including but not limited to Qwest's overall financial condition as described in the press and in Qwest's filings, the Board finds that Qwest's showing is sufficient to establish that application of the reorganization review statute and rules would work an undue hardship on Qwest. The first factor of rule 1.3 weighs in favor of granting Qwest's request for waiver.

The second factor the Board must consider is whether a waiver would prejudice the substantial legal rights of any other person. Here, given Qwest's commitments regarding the proposed transaction, it appears this factor is satisfied as well. It appears the transaction will have no direct effect on Qwest's Iowa customers. The only significant effect the Board has identified is the chance that Qwest might argue, in some future rate proceeding, that imputation of directory publishing revenues would no longer be appropriate because the directory publishing assets have been sold. That potential effect is negated by Qwest's first commitment. The

Board finds that the second factor of rule 1.3 also weighs in favor of granting the requested waiver.

The third factor the Board must consider is whether the provisions of the rule being waived are specifically mandated by statute or another provision of law. The answer here is contained in the statute: Section 476.77(4) authorizes the Board to waive the reorganization statute "if the board finds that board review is not necessary in the public interest." Clearly, the statute does not specifically mandate Board review of a proposed transaction when it authorizes the Board to grant a waiver of the requirement. The Board finds that the third factor of rule 1.3 supports granting Qwest's request.

Finally, the Board must consider whether substantially equal protection of public health, safety, and welfare will be afforded by means of the various commitments offered by Qwest. The Board finds that the Qwest commitments essentially put customers in the same position that they would have occupied if the transaction did not occur. Qwest does not gain any new arguments against imputation and directories will continue to be published and distributed as they have been. In fact, the public interest may be advanced by granting a waiver and allowing the proposed transaction to proceed, as the result appears to be an improvement in Qwest's financial condition. The Board finds that the fourth factor of rule 1.3 also weighs in favor of granting the request for waiver.

Thus, all four factors that the Board must consider pursuant to 199 IAC 1.3 support granting Qwest's request for waiver. On that basis, the Board finds that its review of the proposed transaction is not necessary in the public interest and the requirements of Iowa Code § 476.77 and the Board's reorganization rules may be, and will be, waived.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Amended Request For Expedited Waiver" filed by Qwest Corporation on October 15, 2002, is granted.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 18th day of October, 2002.